*Allen* v. *Berryhill* (1869) 27 Ia. 534, 551, for an excellent discussion of this point.

Probably the chief explanation of the prevalence of this anomalous doctrine that insanity does not absolutely destroy the contractual powers, is to be found in the frequent confusion of contractual with quasi-contractual principles. The decisions commonly notice the absence of a mind necessary to contract but find it expedient to hold the insane person bound at least by a voidable contract, for the protection of the other party. *Eaton* v. *Eaton* (1874) 37 N. J. L. 109; *Flack* v. *Gottschalk* (1898) 88 Md. 368, 375. The natural inference is that the court has in mind, not a real contract, but an obligation imposed by the law although enforced in a contract action, *Pearl* v. *M'Dowell* (Ky. 1830) 3 Marsh. 659, 662, and the measure of recovery in such a case should be determined not by the terms of the contract, but by the benefit received by the other party. Further evidence of the consideration by the courts of the equitable principle of unjust enrichment in thus granting a recovery upon the contract is to be found in the rule commonly recognized, Page on Contracts § 901 and cases cited, that the contract will not be held binding on the non compos mentis provided he can put the adverse party in statu quo by restoring to him the consideration received or its equivalent.

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RIGHT OF A SPECIAL DEPOSITOR TO A PRIORITY.—It is one of the duties of a trustee of an express trust to keep the trust fund separate and distinct from his own personal funds. *Bemmerly* v. *Woodward* (1899) 124 Cal. 568. Where he has mingled the funds and thereafter become bankrupt, the early rule in equity forced the cestui to come in with the trustee's general creditors on the ground that the identity of the res had been lost. *Ex parte Dale & Co.* (1879) 11 Ch. Div. 772 and authorities cited. In order, however, that the trustee might not by his own wrong deprive the cestui of his priority, equity came to recognize in the cestui a new right, an equitable charge in the mingled funds. *Knatchbull* v. *Hallett* (1879) 13 Ch. Div. 696, 708–721; *Nat. Bank* v. *Ins. Co.* (1881) 104 U. S. 54, 68–70. But a person who gives another money which by the agreement is to be mingled with the other's personal funds has no intention to create a trust. The necessity of an intention to create and maintain a separate fund in order to constitute a trust seems to have been disregarded in the dictum of a recent case in the federal court. A deposited a check "for collection" with the B bank who forwarded to the C bank "for collection." The C bank collected and remitted by its own draft on a New York bank. The C bank then became insolvent and by order of its receiver, payment on the draft was refused. It was held *inter alia* that the C bank continued under a trust obligation to A, although there might be a uniform custom among banks to remit the proceeds of checks sent them for collection by their own drafts; the intention of the parties being nevertheless that the special depositor should not be a mere creditor. *Holder* v. *Western German Bank* (C. C. A. 6th C. 1905) 136 Fed. 90. If there was no authority to mingle, *Knatchbull* v. *Hallett*, supra, is in point. If there was such authority, the depositor's preference cannot be based on trust principles. *Farley* v. *Turner* (1857) 26 L. J. Ch. 710; *Montagu* v. *Pac. Bank* (1897) 81 Fed. 602; *City of St. Louis* v. *Johnson* (U. S.

1879) 5 Dill. 241, present the same confusion, holding that a trust is impressed on the special deposit, although the facts negative any intention to maintain a separate fund. See also *Cutler* v. *Am. Exch. Nat. Bank* (1889) 113 N. Y. 593 and *Drovers' Nat. Bank* v. *O'Hare* (1887) 119 Ill. 646. Where there is clearly an intention to have the funds kept separate special deposit constitutes a trust. *Peak* v. *Ellicott* (1883) 30 Kan. 156.

In the absence of a statute requiring the recording of chattel mortgages, a special preference might be found where mingling is authorized on the theory of an equitable lien or mortgage, if the Court could find an agreement to give such security. For equity will enforce such an agreement, both as regards assets owned by the equitable mortgagor at the time of the mortgage, *Donald & Co.* v. *Hewitt* (1859) 33 Ala. 534, and those acquired thereafter. *Tailby* v. *The Official Receiver* (1888) L. R. 13 App. Cas. 523. Such equitable lien is superior to the rights of general creditors. *Carter* v. *Holman* (1875) 60 Mo. 498. As equity, by the equitable mortgage, gives effect to the intention of the parties, an oral agreement would be as valid as a written agreement, the writing not under seal being no more efficient than mere words in effecting the conveyance of a legal estate. Pomeroy Eq., 3rd ed., § 1235. It might be difficult to satisfy the requirement of particular identification, *Adams* v. *Johnson* (1866) 41 Miss. 258 266, but an understanding that all the funds of the bank should be liable as security to the special depositor would seem sufficient. In most states, however, recording statutes have abrogated the equitable rule that prior in time is prior in equity. Pomeroy Eq. § 1291 n. 3. In such states the special depositor who authorizes a mingling could not be given a preference on any ground, there being no record of the mortgage.

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CONSTITUTIONALITY OF A STATUTE RESTRICTING COMMON LAW REMEDY FOR LIBEL.—To overcome the effect of the troublesome common law fiction of implied malice in libel, 5 COLUMBIA LAW REVIEW 610, has been the object of not a little legislative action. 94 Ohio Laws, p. 295; Gen. Stat. Conn. § 1116; Rev. Laws Mass. (1902) p. 1564. The Ohio statute is worded as follows: "If it shall appear ....that the publisher, upon demand....published a full....retraction....the presumption of malice attaching to....the publication of said libelous matter shall be thereby rebutted." In a lately decided case the defendant published a retraction immediately following the libel. The plaintiff, however, claimed that the statute should not avail the defendant because no demand had been made for the retraction. The court sustained the plaintiff, holding that the statute in question, unless construed so as to give force to the words "upon demand," would deprive the defendant of his lawful remedy and so be unconstitutional as conflicting with the provision in the Ohio Constitution that "every person, for an injury done him in his.... reputation, shall have remedy by due course of law." *Post Pub. Co.* v. *Butler* (1905 C. C. A. Ohio) 137 Fed. 723.

The court reaches this conclusion by the following steps: (1) At common law the plaintiff had only to prove a publication actionable per se to recover general damages, since injury was necessarily presumed from the words themselves. (2) Under the statute, being com-